No. 312

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

UNITED STATES OF AMERICA, *Petitioner*

v.

THE OHIO POWER COMPANY

On Petition for a Writ of Certiorari to the United States Court of Claims

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REPLY MEMORANDUM FOR THE OHIO POWER COMPANY

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The Government has urged that our motion to vacate this Court's order of June 11, 1956 and to dismiss the continued petition for rehearing of denial of certiorari should not be decided now but should be held in abeyance pending this Court's decisions on the merits in the *Allen-Bradley* and *National Lead* cases. The Government has made no attempt to answer the arguments advanced in support of our motion, or to meet important and substantial questions raised by it. The only basis advanced for the Government's position is that if the *Allen-Bradley* and *National Lead* cases are decided in favor of the taxpayers, the Government's petition for rehearing which has been tenta-

tively restored to the docket could then properly be denied on the merits without passing upon the questions under this Court's Rules and the Judicial Code posed by the entry of the order of June 11, 1956. This is nothing more than an attempt to sidestep these questions, which, for the reasons indicated heretofore and herein, are necessarily raised by this Court's order of June 11, 1956 and should be decided by it.

In thus attempting to avoid consideration of the serious procedural problem posed by the order of June 11, 1956, the Government would in fact compound that problem. The action suggested would leave in full force and effect as a precedent and guide to counsel in future cases an order vacating after a lapse of over six months the denial of a petition for rehearing of denial of certiorari, apparently on the basis of the grant of certiorari in cases involving related issues. Unless this order is promptly vacated and the procedure which it impliedly sanctions is rejected, a serious doubt is raised as to when the orders of this Court denying certiorari and rehearing become genuinely final. The sound administration of justice requires that counsel be guided, not misguided, by this Court's Rules, and that they be enabled with certainty to know the time within which the judgments and orders of this Court, whether favorable or adverse, may still be reopened.

The uncertainty as to finality resulting from the order of June 11, 1956, and some of the difficulties to which this gives rise, are further illustrated by another case now pending before this Court on petition for certiorari. *Item Co.* v. *NLRB*, No. 450 of this Term. In this case the Court of Appeals for the Fifth Circuit had ordered the enforcement of a continuing order

entered by the National Labor Relations Board against an employer, the Item Co. (220 F. 2d 956). Some months after this Court had denied a petition for certiorari to review this decision (October 10, 1955, 350 U.S. 836), and a petition for rehearing (November 21, 1955, 350 U.S. 905), the Court of Appeals for the Ninth Circuit on June 25, 1956 rendered an apparently conflicting decision. *NLRB* v. *F. W. Woolworth Co.*, 235 F. 2d 319. On the basis of this conflict, the Government promptly petitioned for certiorari in the *F. W. Woolworth* case, and such petition is now pending before this Court (No. 413).

Under these circumstances the precedent of this Court's order of June 11, 1956 in the *Ohio Power* case would appear to support a motion by *Item Co.* to vacate the order denying its petition for rehearing of denial of certiorari and to continue such petition for rehearing on the docket pending decision in the *F. W. Woolworth* case.* In fact, the Item Co. has not filed such a motion. Instead it has sought to accomplish substantially the same objective by going back to the Court of Appeals for the Fifth Circuit for the modification of that Court's decree in the light of the intervening decision in the *Woolworth* case and has then sought from this Court a writ of certiorari to review the Fifth Circuit's denial of such a motion.

In opposing this petition for certiorari the Government notes (p. 4) the existence of a question about the power of a court under the Judicial Code to reopen its final judgments after rehearing time has expired,

* While the alleged conflict in the *Item Co.* case did not develop until June 25, 1956, so that no such motion could have been filed prior to the end of the term, this would not seem a material difference in view of the fact that Section 452 of the Judicial Code has deprived the end of the term of all legal significance.

and urges that in any event only a "truly extraordinary showing" should justify such departure from "ordinary principles of finality." And the Government has taken the position in the *Item Co.* case that a subsequently developed conflict with the Court of Appeals of another Circuit is not such a "truly extraordinary showing." Such principles of course should be even more applicable in *Ohio Power,* which involves a money judgment, than in *Item Co.,* for at least in the *Item Co.* case the asserted conflict relates to a continuing enforcement order of the Court of Appeals.

The order of June 11, 1956 in the *Ohio Power Co.* is a radical departure from these principles—a departure which the Government sees fit to urge when it wants to reopen an adverse decision but which it decries when, as in the *Item Co.* case, the shoe is on the other foot. To allow this order to stand is to preserve what we believe to be an erroneous and mischievous precedent. If it remains uncorrected, it seems clear that responsible counsel cannot conscientiously advise their clients to accept the finality of denial of certiorari so long as there is a possibility of the development of a conflict within any reasonable time.

The time within which a denial of certiorari is to become final is not the kind of question which should turn upon the vague standard of reasonableness under the particular circumstances, a standard which every litigant will honestly believe should encompass his situation and which can be delineated only by the laborious process of case-by-case application. It should rather be definite and certain—plain to counsel and litigants as well as to the Court. Under Section 452 of the Judicial Code and this Court's Revised

Rules that time is perfectly plain and definite—it runs until a denial of a timely petition for rehearing or the expiration of the rehearing time. If it is not this, then only the vague standard of reasonableness remains.

The Government's position comes down to advising the Court to overlook this problem entirely, on the theory that the case may eventually be terminated for other reasons. If we are correct in our view as to the importance of the problem which is posed by the order of June 11, 1956, however, and the unfortunate effect on the administration of justice of letting it stand uncorrected, this suggestion must be rejected.

Furthermore, in its reply the Government has failed to make answer of any kind to the second ground supporting our motion to vacate the order of June 11, 1956, and has attempted to leave the impression that a decision on the merits in favor of the Government in *National Lead* and *Allen-Bradley* would require the same result in the *Ohio Power* case if the procedural problems are laid aside. As pointed out in our motion (pp. 20-44), whatever disposition this Court makes of the *National Lead* and *Allen-Bradley* cases, the decision below in *Ohio Power* cannot be adversely affected. This must follow because the Executive Order and the new administrative regulation of October 5, 1943, which are the Government's sole justification for the excess-war-cost percentage certificates in the *National Lead* and *Allen-Bradley* cases, were by their express terms inapplicable to Ohio Power's emergency facility. That the new regulation and the Executive Order can have no application to Ohio Power's emergency

facility is corroborated and underlined by the affidavit** of the Government official who supervised the issuance of excess-war-cost percentage certificates for WPB which states that the regulation of October 5, 1943, was expressly made inapplicable to construction commenced prior to that date "out of fairness to the applicant who had already spent his money or who had previously filed his application."

Holding this motion in abeyance will therefore solve nothing.

The motion to vacate this Court's order of June 11, 1956 and to dismiss the Government's continued petition for rehearing, filed November 10, 1955, should accordingly be granted, without awaiting the decision of the *National Lead* and *Allen-Bradley* cases on the merits.

Respectfully submitted,

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November 8, 1956

** This affidavit is a part of the record in the *National Lead* case (No. 124). It was first produced by the Government in the case of *U. S. Graphite Co.* v. *Harriman*, 71 F. Supp. 944 (Dist. Ct., D.C.) and was included in the Court of Claims record in *Wickes Corp.* v. *United States*, 108 F. Supp. 616 (Ct. Cls. 1952).